



**BOARD OF APPEALS**  
Jesse Geller, Chair  
Johanna Schneider  
Lark Palermo

# *Town of Brookline*

## *Massachusetts*

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TOWN OF BROOKLINE  
BOARD OF APPEALS  
CASE NO. 2022-0041  
29 SHAW ROAD

Petitioners, Corey and Katie Fehnel, applied to the Building Commissioner for permission to construct an attached two-car garage and finish the basement at 29 Shaw Road. The application was denied, and an appeal was taken to this Board.

The Board administratively determined that the property affected was that shown on a schedule certified by the Board of Assessors of the Town of Brookline and fixed September 29, 2022, at 7:00 p.m., virtually as the date, time and place of a hearing for the appeal. Notice of the hearing was mailed to the Petitioner, to their attorney (if any) of record, to the owners of the properties deemed by the Board to be affected as they appeared on the most recent local tax list, to the Planning Board and to all others required by law. Notice of the hearing was published on September 15, 2022, and September 22, 2022, in the Boston Globe, a newspaper in general circulation in Brookline. A copy of said notice is as follows:

**TOWN OF BROOKLINE – Zoning Board of Appeals**  
**NOTICE OF HEARING**

**The Brookline Zoning Board of Appeals will hold a public hearing on**

**Date/Time:** Thursday, September 29, 2022

**Location:** Virtual Hearing

**Virtual Registration Link:** <https://bit.ly/3RvvgYi>

**Petitioner:** Katie & Corey Fehnel

**Address:** 29 Shaw Road

**Subject:** Construct an attached two-car garage and finish basement

**Nature of Action/Relief:**

§5.20 - FLOOR AREA RATIO

§5.43 - EXCEPTIONS TO YARD AND SETBACK REGULATIONS

§5.60 - SIDE YARD REQUIREMENTS

§6.04.5.C.2 – DESIGN OF ALL OFF-STREET PARKING FACILITIES

§8.02.2 – ALTERATION AND EXTENSION

*Plans and submissions may be viewed online at*

*<https://brooklinema.gov/DocumentCenter/Index/2352>*

*Interested persons may provide comments at the public hearing or by submitting written comments by email to [manthony@brooklinema.gov](mailto:manthony@brooklinema.gov).*

*Assistive Listening Devices are available upon request:*

*<https://www.brooklinema.gov/560/Americans-With-Disabilities-Act-ADA>*

**Publish: 9/15/2022 & 9/22/2022**

On December 15, 2022, the Zoning Board of Appeals held a public hearing.<sup>1</sup> Present at the hearing was Chair Jesse Geller and Board Members Randolph Meiklejohn and Neil Wishinsky. The case was presented by the attorney for the Petitioner, Robert L. Allen, Jr., RLAW P.C., 300 Washington Street, Brookline, Massachusetts. Also in attendance were the Petitioners, Corey and Katie Fehnel, and the project architect, Anthony Sparandara, Ask Design & Build, 18 Market Street, Cambridge, Massachusetts.

Zoning Board of Appeals Chair Geller called the hearing to order at 7:00 pm. Chair Geller reviewed the standard hearing procedure for virtual hearings and confirmed that all Board Members and staff could visually and auditorily engage in the hearing. Attorney Allen waived a reading of the published notice.

Attorney Allen presented the case for the Petitioners stating that the single-family home located at 29 Shaw Road is in an S-7 Single-Family Zoning District. Attorney Allen described the design review process with the Planning Board. He stated that at the first Planning Board meeting, the Board requested that the Petitioners reduce the size of the garage that was planned to be 520

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<sup>1</sup> The Board of Appeals continued this matter on: September 29, 2022; October 27, 2022; November 10, 2022; and to December 15, 2022.

square feet with a side yard setback of 1.4-feet. Attorney Allen stated that the proposal was reduced and added that the garage now has been planned to have a setback of 5-feet, and the mudroom setback complies at 7.5-feet. He continued that this change created an opportunity to provide a 5-foot landscaping buffer and as a result the Planning Board was unanimously supportive of the revised design.

Mr. Sparandara reviewed the site plan and added that the garage square footage does not increase the FAR.

Attorney Allen stated that the Petitioners are requesting a finding under M.G.L. Ch. 40A, Section 6, to allow for the increase of the preexisting nonconforming FAR. He noted that no new nonconformities would be created and there would not be a substantial detriment to the neighborhood due to the increase from 3,268 square feet to 4,033 square feet. He noted that most of the new area is within the existing garage accessed to the rear of the home.

Attorney Allen continued that the proposed garage structure requires relief for the side yard setback because the Zoning By-Law requires a 7.5-foot side yard setback, and the proposed side yard setback is 5-feet. Attorney Allen stated that relief is also required for the driveway, stating that a setback of approximately 7-feet is required and the proposed setback is approximately five-feet. He argued that relief may be granted by special permit pursuant to **Section 5.43** of the Zoning By-Law noting that the Petitioner would provide additional landscaping to satisfy the counterbalancing amenity requirement.

Upon inquiry from Chair Geller, Attorney Allen opined that the non-conformity created by the garage and by the driveway did not constitute a “new” non-conformity which would prevent relief under M.G.L. Ch. 40A, Section 6 because the Board could bifurcate the relief requested into two parts to allow for the “Section 6” finding for the FAR without consideration of the setback relief because it was unrelated to the FAR relief. He continued that the additional gross floor area

complies with the required setback and thus would not create a new nonconformity and the proposed garage does not increase the FAR and relief may be granted pursuant to **Section 5.43** of the Zoning By-Law. Mr. Allen commented that this interpretation is consistent with prior Zoning Board of Appeals decisions in the Town.

Attorney Allen then noted that the Board of Appeals has used the special permit requirements enumerated in **Section 9.05** to review substantial detriment in previous cases, stating the following: 1) Specific site is an appropriate location for such use: The property is in a residential neighborhood and the addition will maintain this use. 2) Use will not adversely affect the neighborhood: There will be no change to the use and the proposed addition will not adversely affect the neighborhood. 3) No nuisance or serious hazard to vehicles or pedestrians: The changes to the vehicular circulation will be improved. 4) Adequate and appropriate facilities will be provided for the proper operation and proposed use. 5) Development will not have any effect on the supply on housing available for low- and moderate-income people.

Upon inquiry from Board Member Meiklejohn, Mr. Sparandara described the proposed 5-foot landscaping buffer as including a mix of perennial plantings and ground cover and may include an informal path to the back yard. He described the significant grade change and added that a paver or two may be needed to create steps.

Chair Geller then called for public comments in support of or in opposition to the Petition. No public comments were provided.

Chair Geller then called upon Planner and Zoning Coordinator, Madison Anthony to deliver the Planning Board Report:

#### FINDINGS

§5.20 - FLOOR AREA RATIO

§5.43 - EXCEPTIONS TO YARD AND SETBACK REGULATIONS

§5.60 - SIDE YARD REQUIREMENTS

§6.04.5.C.2 – DESIGN OF ALL OFF-STREET PARKING FACILITIES

§8.02.2 – ALTERATION AND EXTENSION

ZONING: S-7	Requirements	Existing Conditions	Proposed Conditions	Relief Required
Floor Area Ratio (house)	0.35 3,010 sf	0.38 3,300 sf	0.48 4,104 sf	<u>Special Permit</u> <sup>1</sup>
Side Yard Setback (attached garage)	7.5'	26'	1.4'-3'	<u>Special Permit</u> <sup>2</sup>
Side Yard Setback (driveway)	5'	n/a	0'	<u>Special Permit</u> <sup>2</sup>

<sup>1</sup> Under MGL Chapter 40A, Section 6, a pre-existing nonconforming structure can extend or intensify the nonconformity by special permit provided the Board of Appeals finds that the altered structure is not substantially more detrimental to the neighborhood than the existing structure.

<sup>2</sup> Under Sec. 5.43, a special permit may waive a yard setback if a counterbalancing amenity is offered. In this case, landscaping is being offered to serve as a counterbalancing amenity.

Section 8.02 – Alterations or Extensions of a Non-conforming Structure

PLANNING DEPARTMENT COMMENTS

Ms. Anthony stated that the Planning Department is supportive of this proposal to construct an attached garage and convert the prior garage into habitable space. She noted that by relocating the garage to the front of the house from the back, the backyard can be used for open space, and by converting the former garage to habitable space, there should have no negative impact on the surrounding neighborhood. She added that staff recommended that the driveway be narrowed by about three feet and provide a strip of landscaping or decorative paving between the driveway and the property line.

PLANNING BOARD COMMENTS

Ms. Anthony stated that the Planning Board was pleased that the applicant addressed the concerns of the Planning Board by increasing the setback at the northwest corner for the garage to five feet and to seven and a half feet at the start of the mudroom, eliminating the door adjacent to

the garage, reducing the size of the addition and shifting it toward the house, lowering the ridge line and adjusting the roof to accommodate the intersection with the existing building, and maintaining a five-foot offset from the property line for the driveway.

Therefore, Ms. Anthony stated, the Planning Board recommended approval of the site plan by John Hamel, dated 10/26/22, and architectural plans by Ask+, dated 11/4/22, subject to the following conditions:

1. Prior to the issuance of a building permit, the applicant shall electronically submit final floor plans and elevations, stamped and signed by a registered architect, and a final site plan, stamped and signed by a registered engineer or land surveyor, to the Assistant Director for Regulatory Planning for review and approval.
2. Prior to the issuance of a building permit, the applicant shall electronically submit a landscape plan subject to approval by the Assistant Director for Regulatory Planning. The counterbalancing amenities must be executed in accordance with the approved plan.
3. Prior to the issuance of a building permit, the applicant shall electronically submit to the Building Commissioner for review and approval a) the site plan, floor plans, and elevations displaying the approval stamp of the Assistant Director for Regulatory Planning; and b) evidence that the Board of Appeals decision has been obtained from the Town Clerk's office by the applicant or their representative and recorded at the Registry of Deeds.

Chair Geller then called upon Deputy Building Commissioner, Paul Campbell, to deliver the findings of the Building Department. Mr. Campbell confirmed that relief would be required for the driveway setback and stated that the Building Department had no objection to the requested relief and would work with the Petitioners to ensure conformance with the Board's decision and all applicable building codes.

In deliberation, Board Member Wishinsky was supportive of granting the requested relief. He noted that it would be an improvement to the house and seems to fit into the single-family neighborhood. He added that having a garage along the side of the house is a better arrangement than driving down a hill and having to turn. He stated that the proposal meets conditions for the requested relief and reviewed the special permit standards outlined in **Section 9.05** of the Zoning

By-Law. Furthermore, Board Member Wishinsky added that the proposed counterbalancing amenities were appropriate. Board Member Meiklejohn stated that the proposal was nicely executed. He added that the grant of the requested relief under M.G.L. Ch. 40A, Section 6 would not create a substantial detrimental to neighborhood. Chair Geller stated that the request appears to meet the standards under M.G.L. Ch. 40A, Section 6, and added that as presented, the proposal does not meet the threshold of being more substantially detrimental to the neighborhood. However, he questioned whether the proposed garage and driveway relief might constitute “new” non-conformities but in reliance on testimony that the Board of Appeals has allowed a bifurcated approach on prior cases in Brookline, and in the absence of case law providing clarity, he was sufficiently satisfied to support that the standard for required relief in the current case.

The Board then determined, by unanimous vote based on the revised plans identified above, that the proposal met the requirements for a finding under M.G.L. Ch. 40A, Section 6, to allow for an alteration and increase in the preexisting nonconforming FAR (under **Section 5.20** of the Zoning By-Law) from a 0.38 to 0.468. The Board also granted a special permit relief from the provisions of **Section 5.60** for the side yard setback and waiving the provisions of Section **6.04.5.C.2**, pursuant to **Section 5.43**.

In addition, the Board made the following specific findings under **Section 9.05** based on the evidence submitted at the hearing and the Board’s deliberation:

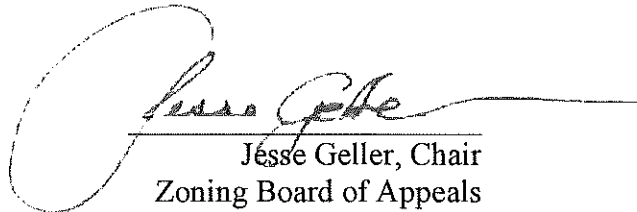
- a. The specific site is an appropriate location for such a use, structure, or condition.
- b. The use as developed will not adversely affect the neighborhood.
- c. There will be no nuisance or serious hazard to vehicles or pedestrians.
- d. Adequate and appropriate facilities will be provided for the proper operation of the proposed use.

- e. Development will not have any effect on the supply of housing available for low- and moderate-income people.

Accordingly, the Board voted unanimously to grant the requested relief but subject to the following revised conditions:

1. Prior to the issuance of a building permit, the applicant shall electronically submit final floor plans and elevations, stamped and signed by a registered architect, and a final site plan, stamped and signed by a registered engineer or land surveyor, to the Assistant Director for Regulatory Planning for review and approval.
2. Prior to the issuance of a building permit, the applicant shall electronically submit a landscape plan indicating the counterbalancing amenities, subject to review by and approval of the Assistant Director for Regulatory Planning. The counterbalancing amenities must be executed in accordance with the approved plan.
3. Prior to the issuance of a building permit, the applicant shall electronically submit to the Building Commissioner for review and approval a) the site plan, floor plans, and elevations displaying the approval stamp of the Assistant Director for Regulatory Planning; and b) evidence that the Board of Appeals decision has been obtained from the Town Clerk's office by the applicant or their representative and recorded at the Registry of Deeds.

Unanimous Decision of  
The Board of Appeals



Jesse Geller, Chair  
Zoning Board of Appeals

Filing Date: 1/18/2023

A True Copy  
ATTEST:



Benjamin Kaufman  
Clerk, Board of Appeals